BRB No. 00-1051 BLA

MARY E. COLEMAN (Widow of FELIX H. COLEMAN) Claimant-Petitioner v. HARMAN MINING CORPORATION and OLD REPUBLIC INSURANCE COMPANY Employer/Carrier- Respondents DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	)	DATE ISSUED: DECISION and ORDER

Appeal of the Decision and Order on Remand Denying Benefits of Thomas M. Burke, Administrative Law Judge, United States Department of Labor.

Daniel Sachs (Law Offices of Daniel Sachs), Springfield, Virginia, for claimant.

Laura Metcoff Klaus (Greenberg Traurig LLP), Washington, D.C., for employer.

Before: HALL, Chief Administrative Appeals Judge, SMITH and DOLDER, Administrative Appeals Judges.

HALL, Chief Administrative Appeals Judge:

Claimant[1] appeals the Decision and Order on Remand Denying Benefits (96-BLA-

[1]Claimant is the surviving spouse of the miner, who died on May 19, 1998. Director's

0071) of Administrative Law Judge Thomas M. Burke on a claim filed pursuant to the provisions of Title IV of the Federal Coal Mine Health and Safety Act of 1969, as amended, 30 U.S.C. §901 *et seq.* (the Act).[2] This case involves a duplicate miner's claim filed on April 6, 1994,[3] which was considered under the applicable regulations at 20 C.F.R. Part 718

Exhibit 5.

[2]The Department of Labor has amended the regulations implementing the Federal Coal Mine Health and Safety Act of 1969, as amended. These regulations became effective on January 19, 2001, and are found at 65 Fed. Reg. 80,045-80,107 (2000)(to be codified at 20 C.F.R. Parts 718, 722, 725, and 726). All citations to the regulations, unless otherwise noted, refer to the amended regulations.

Pursuant to a lawsuit challenging revisions to 47 of the regulations implementing the Act, the United States District Court for the District of Columbia granted limited injunctive relief for the duration of the lawsuit, and stayed, *inter alia*, all claims pending on appeal before the Board under the Act, except for those in which the Board, after briefing by the parties to the claim, determined that the regulations at issue in the lawsuit would not affect the outcome of the case. *National Mining Ass'n v. Chao*, No. 1:00CV03086 (D.D.C. Feb. 9, 2001)(order granting preliminary injunction). The Board subsequently issued an order requesting supplemental briefing in the instant case. On August 9, 2001, the District Court issued its decision upholding the validity of the challenged regulations and dissolving the February 9, 2001 order granting the preliminary injunction. *National Mining Ass'n v. Chao*, Civ. No. 00-3086 (D.D.C. Aug. 9, 2001). The court's decision renders moot those arguments made by the parties regarding the impact of the challenged regulations.

[3]Claimant originally filed a claim on October 18, 1984. Director's Exhibit 45. In a Decision and Order issued on April 7, 1988, Administrative Law Judge Ben L. O'Brien found thirty-eight and one-half years of coal mine employment established and adjudicated the claim pursuant to 20 C.F.R. Part 718 (2000). Judge O'Brien found the existence of pneumoconiosis established pursuant to 20 C.F.R. §718.202(a)(1) and (a)(4) (2000), pneumoconiosis arising out of coal mine employment established pursuant to 20 C.F.R. §718.203(b) (2000), and total disability due to pneumoconiosis established pursuant to 20 C.F.R. §718.204 (2000). Accordingly, benefits were awarded. Employer appealed, and the Board affirmed Judge O'Brien's finding pursuant to Section 718.203(b) (2000), but vacated his findings pursuant to Sections 718.202(a)(1) and (a)(4) (2000) and 718.204(c) (2000), and remanded the case for reconsideration. *Coleman v. Harman Mining Corp.*, BRB No. 88-1518 BLA (Jan. 23, 1991)(unpublished).

In a Supplemental Decision and Order On Remand dated July 28, 1992, Administrative Law Judge Edith Barnett found the existence of pneumoconiosis established by the medical opinion evidence pursuant to Section 718.202(a)(4) (2000), but further found that total disability was not established pursuant to Section

(2000). In a prior Decision and Order dated September 17, 1996, Administrative Law Judge Edith Barnett initially found that employer was barred, pursuant to the doctrine of collateral estoppel, from challenging her prior finding in claimant's original, 1984 claim that the existence of pneumoconiosis was established pursuant to 20 C.F.R. §718.202(a)(4) (2000) by means of new evidence in claimant's duplicate claim. Judge Barnett further found the newly submitted evidence sufficient to establish total disability pursuant to 20 C.F.R. §718.204(c) (2000) and, therefore, found a material change in conditions pursuant to 20 C.F.R. §725.309(d) (2000), in accordance with the standard enunciated by the United States Court of Appeals for the Fourth Circuit, within whose jurisdiction this case arises, in *Lisa Lee Mines v. Director, OWCP* [*Rutter*], 86 F.3d 1358, 20 BLR 2-227 (4th Cir. 1996)(*en banc*), *rev'g*, 57 F.3d 402, 19 BLR 2-223 (4th Cir. 1995), *cert. denied*, 519 U.S. 1090 (1997). Judge Barnett further found that total disability due to pneumoconiosis was established under 20 C.F.R. §718.204(b) (2000). Finally, Judge Barnett noted that even if the issue of the existence of pneumoconiosis were relitigated, there was no reason to modify her prior determination that the existence of pneumoconiosis was established by the medical opinion evidence submitted with claimant's original claim pursuant to Section 718.202(a)(4) (2000). Judge Barnett thus found the newly submitted medical opinion evidence confirmed her original finding. Accordingly, benefits were awarded.

718.204(c)(1)-(4) (2000). Accordingly, benefits were denied. Claimant appealed, but subsequently withdrew his appeal. The Board therefore Board dismissed claimant's appeal. *Coleman v. Harman Mining Corp.*, BRB No. 92-2446 BLA (Sept. 23, 1992)(unpublished Order). Claimant thereafter took no further action until filing the instant duplicate claim on April 6, 1994. Director's Exhibit 1.

Employer filed a motion for reconsideration.[4] In a Decision and Order Denying Motion for Reconsideration dated June 30, 1998, Administrative Law Judge Thomas M. Burke (the administrative law judge) noted that because Judge Barnett had died on December 11, 1997, she was no longer available to reconsider her previous decision. The administrative law judge found that reconsideration by an administrative law judge other than Judge Barnett would be inconsistent with the regulatory scheme that designates the Board as the appropriate body to review the Decision and Order of an administrative law judge pursuant to 20 C.F.R. §§725.479(b) and 725.481 (2000). Thus, the administrative law judge denied employer's motion for reconsideration. Employer appealed. The Board vacated the

[4]Employer initially appealed Judge Barnett's Decision and Order on October 7, 1996, but subsequently filed a motion for reconsideration with the Office of Administrative Law Judges on October 25, 1996, which was served on claimant's counsel. Thus, the Board issued an Order on November 26, 1996, dismissing employer's appeal as premature pursuant to 20 C.F.R. §802.206(f) (2000). Employer filed a brief in support of its motion for reconsideration with the Office of Administrative Law Judges on January 6, 1997, which was served on claimant's counsel. After claimant's counsel requested the Office of Administrative Law Judges to provide the status of employer's pending motion for reconsideration and claimant's counsel's pending petition for attorney fees, Judge Barnett issued an Order on October 21, 1997, awarding claimant's counsel attorney fees and stating that she had not received employer's motion for reconsideration. Thus, Judge Barnett gave employer an opportunity to refile its motion within fifteen days of the order. On October 28, 1997, employer refiled copies of its original motion for reconsideration and supporting brief, and indicated that claimant's counsel had been sent certified copies of its filing.

administrative law judge's Decision and Order Denying Motion for Reconsideration, and remanded the case for consideration of employer's motion for reconsideration on the merits. *Coleman v. Harman Mining Corp.*, BRB No. 98-1417 BLA (Nov. 23, 1999)(unpublished). The Board also reversed Judge Barnett's finding in her September 17, 1996 Decision and Order that employer was collaterally estopped from relitigating the issue of the existence of pneumoconiosis, and vacated her alternative finding that, even assuming that employer was not collaterally estopped from litigating the issue of pneumoconiosis, the existence of pneumoconiosis was nonetheless established under Section 718.202(a)(4) (2000). *Id*. The Board remanded the case for the administrative law judge to reconsider all of the relevant evidence under Section 718.202(a)(4) because Judge Barnett had not adequately explained why the opinions of Drs. Wallace and Robinette, as claimant's treating physicians, were entitled to more weight under Section 718.202(a)(4) than the contrary opinions of Drs. Sargent, Castle and Fino, which Judge Barnett did not specifically consider under Section 718.202(a)(4). *Id*. The Board further vacated Judge Barnett's finding under Section 718.204(b) (2000), and remanded the case for reconsideration of the relevant evidence thereunder. *Id.*

In his Decision and Order on Remand Denying Benefits dated July 21, 2000, the administrative law judge considered the claim on the merits, and found the x-ray evidence and medical opinion evidence of record insufficient to establish the existence of pneumoconiosis under Section 718.202(a)(1) and (a)(4) (2000).[5] Accordingly, the administrative law judge denied benefits. On appeal, claimant contends that the administrative law judge erred in finding the evidence insufficient to establish the existence of pneumoconiosis under Section 718.202(a)(1) and (a)(4) (2000). Employer responds in support of the administrative law judge's denial of benefits.[6] The Director, Office of

[5]Before considering the claim on the merits, the administrative law judge, as a preliminary matter, denied employer's motion for reconsideration and motion to re-open the record on remand. Decision and Order on Remand Denying Benefits at 2-4. The administrative law judge also found that, inasmuch as the Board previously affirmed Judge Barnett's prior finding that claimant established total disability pursuant to 20 C.F.R. §718.204 (2000), a material change in conditions was established pursuant to 20 C.F.R. §725.309(d) (2000). *Id*. at 5. The administrative law judge thus stated that he would review all of the evidence of record in considering the merits of the claim. *Id*.

[6]Employer challenges in its response brief the validity of the one-element standard for establishing a material change in conditions under 20 C.F.R. §725.309 (2000), adopted by the Fourth Circuit in *Lisa Lee Mines v. Director, OWCP* [*Rutter*], 86 F.3d 1358, 20 BLR 2-227 (4th Cir. 1996)(*en banc*), *rev'g*, 57 F.3d 402, 19 BLR 2-223 (4th Cir. 1995), *cert. denied*, 519 U.S. 1090 (1997). Employer argues that, under the *Rutter*

Workers' Compensation Programs, has filed a letter indicating he does not presently intend to participate in this appeal.

The Board's scope of review is defined by statute. The administrative law judge's Decision and Order must be affirmed if it is rational, supported by substantial evidence, and in accordance with applicable law. 33 U.S.C. §921(b)(3), as incorporated by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

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standard, once a claimant proves a change as to some element of his claim, the claimant benefits from an "irrebuttable presumption" that the change is material. Contrary to employer's characterization, however, the one-element standard of Section 725.309 (2000) is not a presumption, but is the substantive definition of a material change in conditions, and the one element is simply the fact that must be proven.

On appeal, claimant generally contends that the administrative law judge erred by mechanically deferring to the numerical superiority of the negative x-ray readings without considering the source of those readings. Claimant suggests, that is, that the administrative law judge erred by not discounting the negative readings upon considering that they were retained for the purpose of litigation, while, on the other hand, the positive readings were all developed during the course of the miner's treatment. Claimant's argument lacks merit. In weighing the conflicting x-ray evidence of record, the administrative law judge properly considered both the quantity of positive and negative interpretations as well as the qualifications of the physicians submitting them. *See Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 21 BLR 2-269 (4th Cir. 1997); *Roberts v. Bethlehem Mining Corp.*, 8 BLR 1-211 (1985); Decision and Order on Remand at 5. The administrative law judge properly found that the preponderance of the x-ray readings of record, including a preponderance of the readings submitted by physicians with superior radiological qualifications, is negative for pneumoconiosis, a factual finding which claimant does not contest.[7] *Id.* We, therefore, affirm the administrative law judge's finding that the x-ray evidence of record is insufficient to establish the existence of pneumoconiosis under Section 718.202(a)(1) (2000). *See* 20 C.F.R. §718.202(a)(1).

In challenging the administrative law judge's finding under Section 718.202(a)(4) (2000), claimant argues that the administrative law judge erred in crediting the opinions of Drs. Castle and Fino, which indicate that the miner did not have coal workers' pneumoconiosis or any pulmonary disease related to coal dust exposure. Claimant contends that the opinions of Drs. Castle and Fino are hostile to the Act and should have, therefore,

[7]Substantial evidence supports the administrative law judge's finding pursuant to 20 C.F.R. §718.202(a)(1) (2000). *See* 20 C.F.R. §718.202(a)(1); Decision and Order on Remand at 5. Of the sixty-six x-ray readings of record, fifty-three are negative for pneumoconiosis. While the April 29, 1994 and January 5, 1995 films were read positive for pneumoconiosis by Drs. Aycoth and Cappiello, who are B reader/ Board-certified radiologists, the films were read as negative for the disease by eight and five B reader/ Board-certified radiologists, respectively. Director's Exhibit 35.

been rejected because Drs. Castle and Fino opined that pneumoconiosis can never cause a purely obstructive impairment. This contention lacks merit. In *Warth v. Southern Ohio Coal Co.*, 60 F.3d 173, 19 BLR 2-265 (4th Cir. 1995), the United States Court of Appeals for the Fourth Circuit held that an opinion in which the physician relies upon the erroneous assumption that coal dust inhalation cannot cause an obstructive lung disorder is entitled to little, if any, weight. However, in *Stiltner v. Island Creek Coal Co.*, 86 F.3d 337, 20 BLR 2-246 (4th Cir. 1996), the court held that the central holding in *Warth* does not apply when a physician states that a restrictive component would be seen if the impairment were related to coal dust exposure rather than stating that chronic obstructive pulmonary disease can never result from dust exposure in coal mine employment. In the instant case, contrary to claimant's contention, Drs. Castle and Fino did not opine that pneumoconiosis can never cause an obstructive impairment. Rather, Drs. Castle and Fino indicated that the miner likely would have exhibited a restrictive impairment in addition to an obstructive impairment if coal dust exposure had played a role in his condition. Employer's Exhibits 2, 3, 6. The opinions of Drs. Castle and Fino are thus probative pursuant to *Stiltner*, and contrary to claimant's contention, the administrative law judge was not required to reject them as hostile to the Act.

We agree with claimant, however, that the administrative law judge improperly discounted the medical opinions of record which indicate that the miner suffered from pneumoconiosis – *i.e.*, the opinions of Drs. Sutherland, Wallace, Robinette Kanwal, Modi and Keeley. Director's Exhibits 11, 15, 29, 30; Claimant's Exhibit 3. While claimant overstates that the administrative law judge "completely ignored" the opinions of these physicians, we agree with claimant that the administrative law judge did not adequately address them. After summarizing the opinions, the administrative law judge stated:

> ...every physician who diagnosed pneumoconiosis based his diagnosis at least in part on the existence of positive chest x-ray readings of pneumoconiosis, readings which were subsequently found to be inconsistent with the preponderance of the chest x-ray evidence... [T]he opinions of those physicians who diagnose[d] pneumoconiosis lack credibility because their opinions could have been different if the x-ray evidence they considered had been negative for pneumoconiosis.

Decision and Order on Remand at 9.

We cannot affirm the administrative law judge's basis for discounting the opinions of Drs. Sutherland, Wallace, Robinette Kanwal, Modi and Keeley. A physician's report may not be discredited as undocumented and unreasoned simply because it is based upon an x-ray interpretation which is outweighed by the other x-ray interpretations of record. *See Fitch v. Director, OWCP*, 9 BLR 1-45, 1-47 n.2 (1986); *Casey v. Director, OWCP*, 7 BLR 1-873 (1985). Furthermore, the administrative law judge did not discuss the significance of the fact

that Drs. Wallace and Robinette were the miner's treating physicians.[8] Inasmuch as the administrative law judge did not adequately consider the opinions of Drs. Sutherland, Wallace, Robinette Kanwal, Modi and Keeley and provide a sufficient rationale for discrediting these opinions, we vacate the administrative law judge's finding that the medical opinion evidence of record is insufficient to establish the existence of pneumoconiosis under Section 718.202(a)(4) (2000), and remand the case for reconsideration of the relevant evidence thereunder. In weighing the medical opinions and resolving conflicts posed by the evidence on remand, the administrative law judge must consider the qualifications of the respective physicians, the explanation of their medical opinions, the documentation underlying their medical judgments, and the sophistication and bases of their diagnoses. *See Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 21 BLR 2-323 (4th Cir. 1998)*; Akers, supra*. If, on remand, the administrative law judge determines that the medical opinion evidence is sufficient to establish the existence of pneumoconiosis under Section 718.202(a)(4), he must then weigh that evidence against the x-ray evidence at Section 718.202(a)(1) before reaching an ultimate decision as to whether the requisite element of pneumoconiosis has been established under Section 718.202(a).[9] *See Island Creek Coal Co. v. Compton*, 211 F.3d 203, BLR (4th Cir. 2000). The administrative law judge must then determine on remand, if he reaches the issue, whether the evidence of record is sufficient to establish that the miner's pneumoconiosis was a substantially contributing cause of his totally disabling respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(c). *See* 20 C.F.R. §718.204(c); *see also DeHue Coal Co. v. Ballard*, 65 F.3d 1189, 19 BLR 2-304 (4th Cir. 1995); *Robinson v. Pickands Mather & Co.*, 914 F.2d 35, 14 BLR 2-68 (4th Cir. 1990).

[8]The Board previously vacated Judge Edith Barnett's crediting of the opinions of Drs. Wallace and Robinette because Judge Barnett "mechanistically credited" them on the basis that the doctors were the miner's treating physicians. *Coleman v. Harman Mining Corp.*, BRB No. 98-1417 BLA (Nov. 23, 1999)(unpublished), slip op. at 10. The Board's action in this regard did not dispense with the requirement that the administrative law judge consider and weigh the fact on remand that Drs. Wallace and Robinette were treating physicians, however. *See Grigg v. Director, OWCP*, 28 F.3d 416, 18 BLR 2-299 (4th Cir. 1994)*; Grizzle v. Pickands Mather and Co.*, 994 F.2d 1093, 17 BLR 2-123 (4th Cir. 1993).

[9]In the initial Decision and Order in this case, *i.e.*, Administrative Law Judge Ben L. O'Brien's Decision and Order dated April 7, 1988, Judge O'Brien determined that the existence of pneumoconiosis was not established pursuant to 20 C.F.R. §718.202(a)(2) (2000) inasmuch as the record does not contain biopsy or autopsy evidence. *See* 20 C.F.R. §718.202(a)(2). Judge O'Brien further determined that the existence of pneumoconiosis was not established under 20 C.F.R. §718.202(a)(3) (2000) inasmuch as none of the presumptions thereunder applied. *See* 20 C.F.R. §718.202(a)(3).

Accordingly, the administrative law judge's Decision and Order on Remand Denying Benefits is affirmed in part, and vacated in part, and the case is remanded for further consideration consistent with this opinion.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

I CONCUR:

ROY P. SMITH
Administrative Appeals Judge

DOLDER, Administrative Appals Judge, dissenting:

I respectfully dissent from my colleagues' decision to vacate the administrative law judge's finding that the medical opinion evidence in the instant case is insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4) (2000). Rather than remanding this case for further consideration, I would hold that the administrative law judge adequately addressed the relevant evidence of record in making his determination that the existence of pneumoconiosis was not established. *See* 33 U.S.C. §921(b)(3), as incorporated by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965). Accordingly, I would affirm the administrative law judge's denial of benefits.

NANCY S. DOLDER
Administrative Appeals Judge